Supreme Court, U.S.
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No. 96-318

In The

Supreme Court of the United States

October Term, 1996

DARYLL RICHARDSON and JOHN WALKER,

Petitioners,

vs.

RONNIE LEE McKNIGHT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

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PETITIONERS' REPLY BRIEF

ARGUMENT

The petitioners in this case perform exclusive and vital governmental functions under statutory authority granted by the State of Tennessee: the management and operation of correctional facilities and services for individuals convicted of violating the criminal laws of the State of Tennessee. The legal principles that support the application of qualified immunity to public correctional officials employed at prison facilities operated by the Tennessee Department of Corrections itself, similarly require conferring qualified immunity to quasi-public correctional officials employed at prison facilities managed and operated by the Corrections Corporation of America (CCA) by contractual agreement expressly authorized by Tennessee law.

Respondent and his amici rest their arguments on fundamental misapprehensions of the role played by state-contracted entities and the scope and purpose of qualified immunity. Respondent and his amici wholly overlook the indisputable point that the only category of cases at issue here are those in which a state actor has undertaken actions that are "objectively reasonable," measured by clearly established and controlling statutory and constitutional standards; if the actions are not objectively reasonable, there is no qualified immunity.

Each of the several arguments advanced by respondent for why CCA's quasi-public correctional officers should not be given qualified immunity are clearly counter-policy arguments that states and local governments may consider when it discharges government functions.

Consistent with its role interpreting the Civil Rights Act of 1871 and accompanying immunities, the Court should decide immunity with regard to the type of governmental function at issue, not with regard to a state's discretionary decision respecting how a particular governmental function should be carried out, much less the factors emphasized by respondent and his amici, as whether the state has made civil service and whistleblower protection equally applicable to state agents hired by contract.

A. Respondent's reliance on common law as a bar to qualified immunity for private actors performing vital and exclusive governmental functions is misplaced.

Respondent and his amici place great reliance that there is supposedly no historical or common law analogue for a private party enjoying qualified immunity. The respondent argues that the "private" or "public" distinction is the only relevant inquiry without any explanation as to why this is the dispositive issue. Furthermore, respondent and his amici summarily dismiss the functional approach advanced by petitioners as having no bearing on the matter. (Res. Br. 14).

As petitioners note in their opening brief, numerous decisions of this Court uniformly establish that public officials performing vital discretionary executive and administrative functions enjoy qualified immunity from personal liability in the performance of their official duties. (Pet. Br. 21). The ultimate inquiry should rest entirely on how the Court determines whether a particular state actor should be afforded qualified immunity.

Petitioners' argued in their opening brief that the justification for extending qualified immunity here turns on the "functions it protects and serves, not by the persons to whom it attaches." *Forrester v. White*, 484 U.S. 219, 224 (1988).

The following hypothetical illustrates the viability of the functional approach as well as the inanity of the respondent's position: Suppose for fiscal and other policy considerations, a prison contains two separate wings within a larger correctional facility, one wing is managed by the state with state employed correctional officers while the other wing of the facility is managed on a contract basis. Thus, if correctional officers from each wing take precisely the same objectively reasonable actions, the officers in the state run prison wing would be entitled to qualified immunity while the guards in the contract prison wing would not, even though the guards acted out the same correctional functions that gave rise to claims brought by prison inmates under 42 U.S.C. § 1983.

When applying the respondent's argument that status is the determining factor as in the above hypothetical, one can readily see the anomaly. No principle of law or logic either compels, nor supports this bizarre outcome. Qualified immunity advances the effective performance of vital and necessary governmental functions. It is no concern whether the governmental functions actually performed are undertaken by public officials or private parties acting under direct authority of and on behalf of the state such as these petitioners. *West v. Atkins*, 487 U.S. 42 (1988).

The historical basis at common law for qualified immunity from suit for governmental officials was grounded more upon the particular functions performed as opposed to the status distinctions between "public" or "private" actors which is advanced by the respondent. In fact, any justification for extending qualified immunity should in all cases be based solely upon a thoughtful and deliberate examination by the Court of the precise functions performed by state actors seeking to assert and extend the privilege.

Respondents' reliance upon *Wyatt* for the proposition that all private defendants are prohibited from asserting the defense of qualified immunity is simply wrong. Even the *Wyatt* Court considered the functional aspects of the activity in question in reaching its conclusion regarding the application of qualified immunity to the defendants. The Court's decision denying qualified immunity to the defendants in that case turned on "the nexus between the private parties and the historic purposes of qualified immunity [which] is simply too attenuated to justify such an extension of our doctrine of immunity." The decision in *Wyatt* was reached only after full consideration of the public policy grounds for applying qualified immunity to public officials. *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). The reasoning for the Court's decision in *Wyatt* was based upon the fact that the private parties in *Wyatt* were under no legal obligation to act or exercise discretion, nor did their challenged acts further or enhance the public good. *Id*. Those concerns are clearly not implicated with respect to quasi-public correctional officers such as these petitioners.

Unlike the defendants in *Wyatt*, quasi-public correctional officers perform historical and traditional police power functions exclusively reserved to the sovereign and delegated to private state actors only under authority of Tennessee law and contract. Second, there is no doubt that in their capacity as quasi-public correctional officers, petitioners must routinely perform discretionary functions which are identical to those of their state employed counterparts. Third, respondent's conclusion that the petitioners have no interest in or appreciation for the public good is neither supported nor pursuasive. Respondent's approach rests on an unrealistic and myopic view of the distinction between government employees hired directly to perform a governmental function and contract employees hired to perform the same governmental function. Private entities performing vital state public functions as here equally serve and advance the government's interest in operating and managing correctional institutions in accord with constitutional norms and standards. Governments, moreover, are increasingly offering a public service model with lessons from the private sector. See e.g., "Creating a Government That Works Better and Costs Less," report of the National Performance Review (Sept. 7, 1993), page 43 ("We must change the system. We must force our government to put the customer first by injecting the dynamics of the marketplace.").

In sum, the respondent's reliance on *Wyatt* fails to take into account that the *Wyatt* Court considered the functions performed by the defendants and concluded that the nexus between those functions and the historic purposes of qualified immunity was too attenuated and remote to justify extension of the doctrine. *Id*. at 167-68.

Likewise, the respondent and his amici fail to consider the post-*Wyatt* lower court decisions which are discussed at length in our opening brief which distinguish private parties acting in ways directly related to the performance of a myriad of exclusive and discretionary governmental functions in stark contrast to the narrow pursuit of the parochial private functions and interests undertaken by the defendants in *Wyatt*. Thus, it is clear that the application of the functional approach advanced here is both analytically sound and clearly preferred over the approach offered up by the respondent's simplified reliance upon a party's employment status as either "public" or "private."

B. Respondent's purported distinctions between state prisons and state contract prisons is inappositive.

Respondent relies on a series of purported distinctions between public prison guards and quasi-public prison guards which collapse upon close inspection. The attempted distinctions highlight the weakness and speciousness of respondent's policy arguments.

1. *Insurance*

Respondent offers that private contractors may provide liability or indemnity insurance to its employees justifies withholding from these petitioners the availability of the qualified immunity defense. (Res. Br. 22). The fact is that most often state and municipal governments routinely provide insurance to cover litigation costs. While many state and local governments do provide

insurance, the Court has never relied on that fact nor should it here, in considering the application of qualified immunity to these petitioners. Additionally, given the vexatious and unexpected nature of many prisoner lawsuits, it seems implausible that a prospective employee would necessarily contemplate the availability of liability insurance before accepting a position as a correctional officer among the several states or private prison contractors.

2. *Indemnification*

Respondent also asserts that the potential of indemnification of private employees for judgments against them is sufficient to distinguish them from public employees. (Res. Br. 22). Again, respondent's position is without merit insofar as the same is true of the federal, state and local governments. Despite the potential for indemnification of public employees, the Court has never relied on or even suggested that qualified immunity or its interpretation of § 1983 immunity doctrine turns on the availability or existence of indemnification.

3. *Public Accountability*

The respondent and his amici argue that private actors who perform traditional vital and exclusive governmental functions are somehow protected from public scrutiny and accountability. (Res. Br. 25-31). Respondent's position seems to suggest that once a prison contract is awarded, there is no further governmental oversight and no public access to activities of the corporation, much less

means for redress of violations of the law. Again, respondent's argument is contrary to fact and bears little relationship to reality.

Because custodial detention of an individual is an exclusive power reserved to the sovereign subject to limitations embodied in the Due Process Clause of the Fourteenth Amendment, CCA may provide correctional services as a "partner" or "joint venturer" with the Tennessee Department of Corrections. The state has promulgated comprehensive regulations regarding the operation of both state run and state contract prisons. Likewise, Tennessee has established a legislative Oversight Committee on Corrections to whom CCA is required to provide information on a biannual basis. Tenn. Code Ann. § 41-24-105. Additionally, as contained in the numerous citations in the briefs of respondent and his amici, various publications and media sources have consistently reported on the activities of private correctional facilities.

While it is clear from the foregoing that state contract prisons are open to public scrutiny and accountability, respondent nonetheless claims that extending qualified immunity to quasi-public correctional officers will eliminate judicial oversight brings light upon the principle which is discussed above regarding the category of cases at issue here. It is indisputable that the defense is available in only those instances in which the challenged conduct was undertaken by state actors in an objectively reasonable manner, measured by clearly established constitutional norms and standards. In cases where the actors have not acted in an objectively reasonable manner, there will continue to be "vigorous judicial oversight" to deter abuse.

Just as with any other governmental function, each of the branches of government, as well as the public itself, have the opportunity to review the actions of private correctional facilities and respond accordingly. The legislative branch has the authority and power to create the enabling legislation and contracts which are the life blood of private correctional facilities. Moreover, through the exercise of its legislative Oversight Committee on Corrections, the State of Tennessee provides further performance review and exposure to the actions of its contract prison facilities. The Tennessee Department of Corrections is authorized to promulgate regulations under which the private facilities will operate and therefore set the standards just as they do with state operated correctional facilities. In addition, the state and federal courts are still open and available fora by which aggrieved prisoners may assert claims and secure relief for conduct which is objectively unreasonable. Finally, nothing decided here will impede the citizenry's ability to arrive at their own personal conclusions regarding the efficacy of privately run correctional facilities and to convey their conclusions to their elected representatives to make any appropriate or necessary changes or reforms. Thus, it is clear that these petitioners performing exclusive and traditional governmental functions regarding the operation and management of correctional facilities will be subject to the same level of public accountability and scrutiny required of state correctional facilities.

CONCLUSION

In conclusion, petitioners renew their request that this Court hold that quasi-public correctional officers who perform exclusive and vital governmental functions that require the exercise of discretion under contract with the state are entitled to qualified immunity if a government official would have been entitled to the immunity had he performed the same function instead. The respondent's approach to this issue turns upon an inappropriate and unrealistic view of the distinction between government employees hired directly to perform a governmental function and private sector employees contracted to perform essential governmental functions. The respondent and his amici would have this Court launch a wholesale attack on the considered policy choices of state and local governments. Consistent with its role in interpreting the Civil Acts Rights Act of 1871 and accompanying immunities, the Court should continue to decide the availability of the qualified immunity defense with due and appropriate regard given to the type of government function performed rather than upon a party's employment status whether it be "public" or "private".

For all the foregoing reasons, petitioners pray the judgment of the United States Court of Appeals for the Sixth Circuit denying them qualified immunity be reversed and the matter remanded to the district court

with directions to grant the petitioners' motion to dismiss this action.

Respectfully submitted,

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